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No. 97-1440

In The
Supreme Court of the United States
October Term, 1997

CLIFFORD F. GURNEY, et al.,
Petitioners,

vs.

UNITED STATES OF AMERICA,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

BRIEF OF DEFENDERS OF PROPERTY RIGHTS AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED FOR REVIEW

Whether one who engages in international business has – as a matter of law – no reasonable investment-backed expectation that his property will not be taken by the United States without payment of just compensation?

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Pursuant to Rule 37.2[1] of the Rules of this Court, *amicus curiae* submits this brief in support of Petitioners.

IDENTITY AND INTEREST OF *AMICUS CURIAE*

Defenders of Property Rights is the only national legal defense foundation devoted exclusively to protecting private property rights. Defenders particularly recognizes that vigorous protection of private property rights in the international context is essential to the continued growth and economic well being of all Americans, for we are increasingly competing in a world marketplace.

STATEMENT OF THE CASE

Petitioners are United States citizens with claims against the Government of Iran for real and personal property confiscated or destroyed during the 1979 Iranian Revolution. An international agreement known as the Algiers

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[1] No counsel for either party authored this brief *amicus curiae*, either in whole in part. Furthermore, no person other than *amicus curiae* (their members or counsel) contributed financially to the preparation of this brief.

Declarations created the Iran-United States Claims Tribunal to sit in adjudication of these claims against Iran. Every award against Iran made by the Tribunal was paid in full, including interest, out of a fund supplied by Iran for this purpose.

In May 1990, before the Tribunal had a chance to finish hearing all remaining claims pending before it, the United States entered into a Settlement Agreement (Pet. App. 30a) which appropriated all remaining claims and related property valued under $250,000 of American citizens against Iran. Through this appropriation, known as "espousal," the federal government acquired title to petitioners' claims and other private property.[2] Petitioners neither had a choice in deciding whether their claims and property would be espoused nor did they participate in the settlement negotiations conducted by the United States.

The United States then conveyed these claims (including petitioners' claims) and other privately owned real

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[2] *See La Abra Silver Mining Co. v. United States*, 175 U.S. 423, 459 (1899)(discussing "espousal" as the formal taking up of a citizen's claim against a foreign sovereign and vesting title to the claim in the United States).

and personal property to Iran in exchange for a sum of $105 million from the Iranian government. The United States retained $55 million as settlement of its own claims, and the remaining $50 million was allocated for disbursement to the remaining claimants, including petitioners.

As a result of the federal government's taking of petitioners' claims (choses in action), and real and personal property, petitioners did not receive full or just compensation for the taking of their property; instead, they received only a fraction of the value of their property – an arbitrary amount determined solely by the United States. Pet. App. 91a.

Petitioners filed suit in the United States Court of Federal Claims (CFC) under the Tucker Act, 28 U.S.C. § 1491(a)(1) (1994), for the taking of their property without just compensation. The CFC held that the government was not obligated to pay just compensation to petitioners because: "Having considered the factors pertinent to our inquiry, the court is left with the certain conclusion that the events that befell plaintiffs were part of the risks they assumed in choosing to do business abroad." Pet. App. 29a. That decision was upheld by the United States Court of Appeals

for the Federal Circuit, which agreed stating, "[T]hose who engage in international commerce must be aware that international relations sometimes become strained, and that governments engage in a variety of activities designed to maintain a degree of international amity." Pet. App. 13a.

SUMMARY OF REASONS FOR GRANTING THE PETITION

The United States Court of Federal Claims (CFC) and the United States Court of Appeals for the Federal Circuit – both courts of critical importance given their unique jurisdiction under the Tucker Act to hear all takings claims against the United States – have announced a rule of law in this case that is breathtaking in its implications for Americans engaged in international business[3]:

[3] In 1981, this Court examined the decision of the United States to take over the judgments and outstanding claims of American citizens against Iran and to set up a system of binding arbitration through an Iran-United States Claims Tribunal. *Dames & Moore v. Regan*, 453 U.S. 654 (1981). In *Dames*, this Court upheld the President's authority to nullify and to take over outstanding private judgements and further explained that "to the extent petitioner believes it has suffered an unconstitutional taking by the suspension of the claims, we see no jurisdictional obstacle to an

> Plaintiffs cannot lay claim to an investment-backed expectation free of the potential of Government involvement. Those who engage in international commerce do so in full awareness that the security of their enterprise is uniquely dependent on the maintenance of stability and good order in the relationships of the nations involved. . . . Since the observance of good order among nations can never be taken for granted, the potential for Government involvement in international commerce remains an ever-present fact of life for those who transact their business abroad. . . . Plaintiffs are charged with knowledge of this reality.

Pet. App. 26a (citations omitted).[4]

It is indisputable that Americans who invest abroad cannot expect the United States to guarantee their investments against the instability of foreign governments. But the instant lawsuit is based on the uncompensated taking by the United States of petitioners' real property and claims against a foreign government. Hence, the instability of the

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appropriate action in the United States Court of Claims under the Tucker Act." *Id.* at 689-90.

[4] The decision below was based on plaintiffs' motion for partial summary judgment and defendant's cross-motion for summary judgment. Pet. App. 18-19a.

foreign government was not the cause of the taking of their property, but was merely the justification given by the federal government which took over petitioners' claims in order to settle its own claims against Iran.

Given the importance of international business dealings for Americans, the decision below has enormous implications. According to one study prepared by the U.S. Bureau of Economic Analysis (BEA), in 1996 Americans had invested abroad $970.8 billion valued at the current cost of tangible assets.[5]

Should the decision of the court below stand, this entire sum (or any portion of it) could be espoused, confiscated, or expropriated by the United States government

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[5] Russell B. Scholl, Bureau of Economic Analysis, *The International Investment Position of the United States in 1996*, 77 Survey of Current Business 24, 28 (July 1997). The figure is based on a stock measure of the total outstanding level of U.S. direct investment abroad (USDIA) at a given point in time, specifically 1996. According to Ray Mataloni of the International Division, Research Branch of the Bureau of Economic Analysis, the best measure to reflect the trend in the amount of U.S. money that is being invested abroad is the USDIA as measured in current costs. When measured by current cost, only tangible assets are revalued (factories, inventories, etc.) and price indices for the appropriate asset classes are used. Bureau of Economic Analysis, *A Guide to BEA*

without incurring any legal responsibility to pay just compensation for the assets taken. Nothing in the Constitution or in logic suggests that property located outside this country belonging to American citizens may be taken by the United States without just compensation any more than domestic property may be seized by the government without liability for compensation.

REASONS FOR GRANTING THE PETITION

THIS COURT SHOULD RESOLVE THIS ISSUE OF CRITICAL CONSTITUTIONAL IMPORTANCE CONCERNING WHETHER THE UNITED STATES MAY TAKE THE CLAIMS AND REAL PROPERTY OF AMERICANS WHO INVEST ABROAD WITHOUT INCURRING THE CONSTITUTIONAL OBLIGATION TO PAY JUST COMPENSATION INVESTMENTS ABROAD.

The rule of law announced in this case is a dangerous precedent in an era of the increasing importance of global business to the American economy *(e.g.,* NAFTA)[6]:

Statistics on U.S. Multinational Companies, 75 Survey of Current Business 38, 43 (March 1995).

[6] The current administration has repeatedly underscored the importance of global business for the American economy. "The North America Free Trade Agreement (NAFTA) has not only increased trade with our member partners . . . but also has provided greater stability to the global economy." Proclamation No. 7004, 62 Fed. Reg. 27, 927 (1997).

> Having considered the factors pertinent to our inquiry, the court is left with the certain conclusion that the events that befell plaintiffs were part of the risks they assumed in choosing to do business abroad. Accordingly, no principle of justice would support allocation to the public losses plaintiffs have claimed. In short, there was no taking of plaintiffs' property.

Pet. App. 29a.

Certainly, anyone who chooses to do business abroad takes risks and agrees to suffer the consequences of decisions made by foreign governments. Most petitioners in the instant case assumed that risk. Thus, if this case involved the Iranian government taking over petitioners' assets without payment, there would be no basis for this lawsuit since the United States would not be responsible for guaranteeing that risk.

However, such is not the case. Rather, this case concerns monetary claims owed by the Iranian government to petitioners and real property located in Iran that were expropriated by the United States, without payment of just compensation. Had the Iran-United States Claims Tribunal failed to pay petitioners full value for their claims arising out of the destruction of their assets during the 1979 revolution, again petitioners – having assumed the risk of investing abroad – would possibly have had no recourse against the

United States for that loss.[7] Here, however, the United States took title to (for its own benefit) petitioners' property – in order to settle its own claims – extinguishing petitioner's valid claim to full payment from Iran.

Thus, the holding in this case sets forth the extraordinary proposition that anyone who does business outside the borders of the United States runs the risk that the United States – as a means of negotiating an advantageous deal on behalf of the federal government – may squeeze out smaller private claims.

This Court has, on previous occasions, examined and rejected the government's argument that it is entitled to take some portion of private property – without incurring the Fifth Amendment's obligation to pay the owner for any of the property that is taken – in order to promote the general welfare: "The government in that case had not "merely 'adjust[ed] the benefits and burdens of economic life to promote the common good'. . . . Rather, the exaction is a forced contribution to general governmental revenues, and it is not reasonably related to the costs of using the courts. Indeed, '[t]he Fifth Amendment's guarantee . . . was designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice,

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[7] *Dames & Moore v. Regan*, 453 U.S. 654 (1981).

should be borne by the public as a whole.'" *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 163 (1980)(quoting *Penn Central Transp. Co. v. New York City*, 438 U.S. 104, 124 (1977); *Armstrong v. United States*, 364 U.S. 40, 49 (1960)). *See also Yancey v. United States*, 915 F.2d 1534 (Fed. Cir. 1990)(holding that a government imposed poultry quarantine prohibiting interstate shipment of poultry stock constituted a compensable taking).

In the instant case, there is likewise no reasonable relationship between the government's taking of private claims, in order to provide leverage to settle its own claim, and the risk of doing business abroad. Indeed, the broad reach of the holding in this case suggests that anyone who invests assets abroad[8] has - as a matter of law - no reasonable expectations that the federal government may not one day take over his property and without payment of just compensation as the Fifth Amendment to the Constitution requires. Pet. App. 13a – 14a. Given the magnitude of

[8] It is not just Iran-United States Claims Tribunal claims or even just choses of action that the holding below reaches. All amounts owed to Americans by foreign governments or foreign nationals – *e.g.*, stock traded on foreign exchanges, real property owned abroad including sales and manufacturing facilities, letters of credit from or deposits in foreign banks, payments owed for goods delivered overseas, proceeds of construction contracts, or monies loaned by United States banks to foreign nationals - all could apparently be taken over by the United States and used to reach an international agreement without any obligation to pay the owner just compensation.

private investment abroad, this is an extraordinary legal principle for the U.S. Court of Appeals for the Federal Circuit to adopt.[9] According to the one report from the United States Bureau of Economic Analysis, in 1995 Americans increased their direct investment abroad (USDIA) by $100.8 billion to $880.1 billion.[10] The USDIA increased again in 1996 to reach $970.8 billion.[11]

Contrary to the court below, which held that the President has the "indisputable power to take up and to settle the claims of American citizens against foreign states and nationals" Pet. App. 26a. (citing *United States v. Pink*, 315 U.S. 203, 240 (1942)), there is nothing in this Court's decisions that allows this result. In *United States v. Pink*, 315 U.S. 203, 240 (1942), relied on by the court below, this Court did not even reach the issue herein presented for review, *to wit*, whether this power can be exercised without

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[9] The significance of this decision is underscored by the fact that the U.S. Court of Federal Claims has unique jurisdiction to hear all claims for just compensation against the United States. 28 U.S.C. § 1491 (a)(1) (1998). Hence, this ruling will bind all future decisions on this issue.

[10] Russell B. Scholl, Bureau of Economic Analysis, *The International Investment Position of the United States in 1995*, 76 Survey of Current Business 36 (July 1996).

[11] Russell B. Scholl, Bureau of Economic Analysis, *The International Investment Position of the United States in 1996*, 77 Survey of Current Business 24, 28 (July 1997). The Organization for Economic Cooperation and Development (OECD) reports that, for the years between 1985 and 1995, the United States direct investment abroad increased from $12.72 billion to $96.897 billion. These figures represent

incurring the obligation to pay for any private property taken. *See Monongahela Navigation Co. v. United States*, 148 U.S. 312, 326 (1893) (taking of private property by the government requires the payment of the "full and perfect equivalent for the property taken.").

Not only is the holding of the court below a dangerous precedent in the context of our world economy, which looks to private property rights as the basis of secure international dealings,[12] but the premise that the court can define away as a matter of law the reasonable, investment-backed *expectations* of an entire class of owners of clearly defined property interests could swallow the Just Compensation Clause.

CONCLUSION

Accordingly, because of the breadth of the constitutional holding in this case and because of the

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.32% and 1.39% of GDP respectively. OECD, *Investment* (visited May 18, 1998) <http://www.oecd.org/publications/figures/invest.html>.

[12] International law emphasizes the protection of private property rights in order in part to afford security in the arena of international trade: "In fact, the protection of private property from state interference has been one of the most pronounced themes throughout the history of modern international law since its inception in the seventeenth century. One could even argue . . . that modern international law developed for the express purpose of protecting private property rights from state interference." L. Benjamin Ederington, *Property as a Natural Institution: The Separation of Property from Sovereignty in International Law*, 13 Am. U.J. Int'l L. & Pol'y 263, 264 (1997).

significance of the decision given the magnitude of U.S. investments abroad, *amicus curiae* strongly urge this Court to grant the requested Petition for Writ of Certiorari.

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